No. 83-965

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH B. CLOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-965

RALPH B. CLOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 13-17) that the district court did not possess in rem jurisdiction over a misbranded medical device seized from his offices, and accordingly could not condemn the device pursuant to the provisions of the Federal Food, Drug, and Cosmetic (FDC) Act, 21 U.S.C. 301 *et seq.*. Petitioner also contends (Pet. 17-29) that his due process rights were violated by the procedures used in seizing the device.

1.a. Section 304 of the FDC Act, 21 U.S.C. 334, authorizes the seizure and condemnation of misbranded medical devices, and provides that a misbranded device shall be proceeded against by a libel, following procedures that "conform, as nearly as may be, to the procedure in admiralty" (21 U.S.C. 334(b)).

A diathermy machine[1] and accompanying literature were seized from the offices of petitioner, a Honolulu neurosurgeon, pursuant to Section 304. The seizure was made after a routine inspection by Food and Drug Administration (FDA) officers revealed the misbranded diathermy device. The United States Attorney filed a verified complaint for forfeiture on behalf of FDA in district court, in compliance with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and the clerk of the court, pursuant to Supplemental Rule C(3), issued a warrant for the arrest of the device. The warrant was executed by a United States marshal, who seized the device and its accompanying literature. Pet. App. A 2a, 4a-6a.

A month later, petitioner filed a motion to set aside the warrant of arrest and to declare that issuance of the warrant violated the Fifth Amendment. This motion was denied, and the United States' motion for summary judgment on the misbranding issue was granted. Pet. App. A 6a-7a.[2]

b. On appeal, the court of appeals held that the seizure procedure violated the Fourth Amendment. 641 F.2d 1289; Pet. App. A 1a-25a. The court concluded that the Fourth Amendment required that the warrant of arrest be issued by a neutral magistrate, after an independent determination of probable cause, not simply by a clerk. Pet. App. A 13a-14a.

c. On remand, the district court issued an order to show cause why the seized property should not be returned to petitioner "forthwith." The court ultimately concluded that

---

[1]A diathermy machine produces localized heating of subcutaneous body tissues by means of high-frequency electrical oscillations. The government seized petitioner's machine on the ground that it failed to heat the tissue sufficiently to be medically useful and was not effective therapy for the conditions mentioned in the accompanying literature. Pet. App. A 5a n.3.

[2]Petitioner has not contested that the device was misbranded. Pet. App. B 4a.

return of the seized property was not required, because sufficient evidence independent of that tainted by the illegal seizure had been adduced to support forfeiture. It ordered the property destroyed "after all appeals have been exhausted." Pet. App. D, incorporating Pet. App. C 17a.

d. Petitioner appealed a second time. In the decision that is the subject of this petition, the court of appeals affirmed the district court's disposition on remand. 715 F.2d 1339; Pet. App. B 1a-16a. It held that, under established Ninth Circuit precedent, the district court retained in rem jurisdiction even in the face of a Fourth Amendment violation, and that forfeiture can proceed if the government can show, using untainted evidence, that forfeiture is justified (Pet. App. B 7a). The court determined that such independent evidence exists here (*id.* at 8a-9a).

The court of appeals also rejected petitioner's due process argument. It concluded that this Court's decision in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), established that the public interest in protecting consumers from misbranded products justified Congress' decision to provide in Section 304 for only a post-seizure hearing. Further, the court held, the procedures followed here were adequate; a lawsuit was pending (resulting from filing of the complaint for forfeiture) at the time that seizure was initiated, and the owner was free to obtain a prompt hearing on his claims at any time after seizure. Pet. App. B 10a-16a.

2. The decision below is correct and does not conflict with the opinions of this Court or any court of appeals. Further review by this Court is unwarranted.

a. Petitioner argues first that the district court could not properly obtain in rem jurisdiction over the diathermy device because the device was improperly seized. It has long been established that defects in the manner in which custody of the res is obtained do not defeat the in rem jurisdiction of a court that has such custody. *E.g., Dodge* v. *United*

States, 272 U.S. 530, 532 (1926); *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 205-206 (1845); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 358-359 (1842); see also *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450-451 (9th Cir. 1983). This principle has been applied where the defect related to the authority of the person seizing the res (see, *e.g.*, *Taylor* v. *United States*, *supra*) as well as where the defect was related to constitutional deficiencies in the entry or seizure (see, *e.g.*, *United States* v. *Eighty-Eight Thousand, Five Hundred Dollars*, 671 F.2d 293, 296-298 (8th Cir. 1982); *United States* v. *One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974); *United States* v. *Eight Boxes Containing Various Articles of Miscellaneous Merchandise*, 105 F.2d 896, 898-900 (2d Cir. 1939)).[3] The rationale for the rule was explained by Justice Holmes in *Dodge*, 272 U.S. at 532:

> However effected, [the seizure] brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case [where seizure was not authorized] as in the other [where seizure was authorized]. The jurisdiction of the Court was secured by the fact that the *res* was in the possession of the [proper government official] when the libel was filed.

The court of appeals' decision, therefore, was squarely based on governing precedent.

Petitioner argues, however (Pet. 13-17), that as a matter of policy the district court should have refused jurisdiction, in order to deter future illegal seizures by FDA officials. He

---

[3]This principle corresponds to the rule that a federal court may exercise in personam jurisdiction in criminal cases, regardless of whether the defendant was brought before it by illegal arrest or other defective procedures. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886).

asserts that the mere exclusion of evidence obtained by the seizure was not a genuine sanction, because here the seizure was not used to gather evidence of a crime, but only to remove a misbranded article from use. Petitioner cites no authority to support his position, nor is it supportable. The exclusion of the improperly seized evidence in this case actually did impose a sanction, because the FDA was forced to show that the diathermy device was misbranded using evidence obtained by means other than the seizure. This sanction, which could have resulted in dismissal of the case if independent evidence of misbranding had not existed, is comparable to the exclusionary rule sanction in criminal prosecutions. Moreover, petitioner's proposed additional sanction — the return of the seized property — would be pointless: the returned property could immediately be seized under a new warrant, on the basis of the independent evidence of misbranding that admittedly existed in this case.[4]

In short, no public policy supports petitioner's suggestion that the district court should have required return of the seized property in this case.

b. Petitioner also argues (Pet. 17-29) that the Fifth Amendment requires prior notice and hearing before seizure of a misbranded or adulterated article under Section 304. This issue, however, was settled decades ago by this Court in *Ewing* v. *Mytinger & Casselberry, Inc., supra*, and this Court has repeatedly reaffirmed the correctness of that decision.[5] The Court concluded that Congress could reasonably decide that consumer protection requires the timely

---

[4]This would be merely a nuisance, not a deterrent, and could lead to actual harm to the public if the owners of an admittedly misbranded device managed to secrete it in the interval between return and renewed seizure.

[5]See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 302 (1981); *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612 (1974); *Fuentes* v.

seizure of misbranded articles prior to a hearing, and stated (339 U.S. at 599-600):

> One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control. * * * The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage.

Petitioner insists that *Ewing* addressed only the necessity for a hearing prior to the time the FDA referred the matter to the Attorney General for execution of the seizures, and that *Ewing* left open whether a hearing is required between the time the matter is referred to the Attorney General and the seizures are actually made. This argument is groundless. The *Ewing* Court viewed Section 304 seizures as merely an extension of the well-established power to destroy property without notice or hearing for reasons of public health. The Court reasoned simply that a judicial hearing after "the libels are filed," "satisfies the requirements of due process" (339 U.S. at 598). And subsequent decisions of this Court have interpreted *Ewing* as upholding actual seizures under Section 304 prior to a hearing, not simply referrals to the Attorney General. See, *e.g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-679 (1974); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612 (1974).[6]

Shevin, 407 U.S. 67, 92 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 n.10 (1970).

[6]Petitioner also contends that *Ewing* was undermined by *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, *supra*. But *Fuentes* expressly distinguished and reaffirmed *Ewing* (407

The court of appeals thus correctly determined that *Ewing* forecloses petitioner's argument.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

U.S. at 92) and *Sniadach* involved wage garnishment by a private individual, where no public health interest weighed in favor of immediate seizure. See *Fuentes*, 407 U.S. at 91.

[7]The district court opinions cited by petitioner (Pet. 23) as ostensibly questioning the constitutionality of Rule C of the Supplemental Admiralty Rules, have either been reversed or do not involve the FDC Act.